

In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:)

BARRY DEAN MICHAEL)

Debtor)

Chapter 7 Case

Number 00-21252

FILED

at 8 O'clock & 40 min A M
Date 4/23/01

ORDER ON DEBTOR'S APPLICATION
TO PROCEED IN FORMA PAUPERIS

MICHAEL F. MCHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia PB

Debtor, Barry Dean Michael, submitted an application to proceed *in forma*

pauperis in conjunction with his appeal of the Court's order denying his request for reconsideration. Debtor, an inmate at the Federal Correctional Institute located in Jesup, Georgia, filed a chapter 7 petition *pro se* on September 28, 2000. Debtor paid the required filing fee at the time of filing the bankruptcy case. Subsequently, Debtor filed a motion to appear at the Section 341 meeting of creditors telephonically or, in the alternative, to have the Court order the United States Marshal's Service escort and deliver Debtor to the meeting of creditors. The Court denied Debtor's motion. Debtor's request for reconsideration of that motion was denied on December 20, 2000. Debtor filed the pending notice of appeal of the denial of the request for reconsideration along with an application to proceed *in forma pauperis* on the appeal pursuant to 28 U.S.C. Section 1915.

Debtor
Debtor's Atty.
Creditor
Creditor's Atty.
Trustee Southern
U. S. Trustee

The precedent in this District, pursuant to Hardy v. Hardy (In re Hardy), Civ. Action No. 496-274, slip op. (S.D.Ga. January 30, 1997), is that the bankruptcy court has the authority to consider Debtor's *in forma pauperis* application and the power to authorize an appeal without prepayment of the filing fee. In Hardy, Judge Edenfield held that the bankruptcy court had the authority to grant applications to proceed *in forma pauperis* based on the power that flows to the bankruptcy court as a "unit of the district court" under 28 U.S.C. Section 151. Id. at 3. That decision is binding precedent and will be followed by this Court.¹

In order to proceed *in forma pauperis*, Debtor must submit appropriate documentation in addition to meeting the legal and financial eligibility requirements outlined in 28 U.S.C. Section 1915. Debtor must show that he qualifies financially and that his claim is not "wholly insubstantial" or "fanciful, fantastic, and delusional." Huff v. Brooks (In re Brooks), 175 B.R. 409, 413 (Bankr. S.D.Ala. 1994)(other citations omitted). In this case, Debtor's application incorporates the required statement of assets, liabilities, income and expenses pursuant to Section 1915(a). Debtor's application also demonstrates his belief that he is entitled to redress. The affidavit reflects that Debtor is employed with

¹ The Court notes that Judge Dalis in the case of In re del Rio, ___ B.R. ___, 2001 WL 286778 (Bankr. S.D.Ga. Mar. 14, 2001), recently submitted a report and recommendation to the District Court requesting that it reconsider the Hardy decision on the issue of whether the bankruptcy court is a "court of the United States" as defined in 28 U.S.C. Section 451 and has the authority to exercise the power to waive filing fees under 28 U.S.C. Section 1915. In the del Rio case, Judge Dalis recommended that the District Court deny the Debtor's request to pursue an appeal without prepayment of the fees because the Bankruptcy Court lacks the authority to waive the filing fee on appeal. Id. at *3.

the Jesup Federal Correctional Institute's (FCI) Education Department and earns \$12.00 per month. Debtor has received approximately \$300.00 in gifts from relatives over the last twelve (12) months. Debtor has approximately \$80.00 in his prison commissary account. The average balance of his prison account over the preceding six (6) months was \$100.00. Debtor's affidavit reflects that he owns or has an interest in approximately \$100.00 in stock. Finally, Debtor had \$83.00 in his prison account at the time he filed this appeal and application to proceed *in forma pauperis*.

The Court will consider Debtor's *in forma pauperis* application to determine if Debtor meets the legal eligibility requirements. Section 1915(a)(3) provides, "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C. §1915(a)(3). In addition to finding good faith, the Court must apply the following standards set forth in Section 1915(e):

(e)(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that –

(A) the allegation of poverty is untrue; or

(B) the action or appeal –

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C. §1915(e). Essentially, the Court is required to evaluate the merits of the claim, the strength of the appeal, and exercise discretion in deciding whether to grant *in forma pauperis* relief. “A finding that the plaintiff engaged in bad faith litigiousness or manipulative tactics warrants dismissal.” Attwood v. Singletary, 105 F.3d 610, 613 (11th Cir. 1997). In this case, Debtor is appealing the denial of his request for reconsideration of his motion to appear at the Section 341 meeting of creditors telephonically, or in the alternative, to have the Court order the United States Marshal’s Service escort and deliver Debtor to the meeting of creditors. Debtor’s appeal addresses a fundamental issue in his bankruptcy case which is the Bankruptcy Code requirement to personally appear at the meeting of creditors. The Court recognizes Debtor’s right to appeal. The Court does not find that Debtor’s appeal was filed in bad faith. While the Court is of the opinion that Debtor is not likely to succeed on such appeal, the Court cannot say that all of the grounds for appeal are frivolous, malicious, or baseless.

Finally, the Court must consider Debtor’s financial eligibility to proceed *in forma pauperis* in order to determine if Debtor has the ability to pay the appeal filing fee. The filing fee for an appeal in bankruptcy is \$105.00. *See* 28 U.S.C. Section 1930(c). In this case, Debtor’s statement reflects that he had \$83.00 in his prison account at the time he filed the application and that the average monthly balance in that account over the past six months was \$100.00. Debtor earns \$12.00 per month from his employment and has

received approximately \$300.00 over the past year in gifts from relatives. In addition, Debtor's affidavit reflects that he owns approximately \$100.00 in stock. Under the facts of this case, the Court concludes that Debtor's application establishes that he has the means to pay the \$105.00 appeal filing fee. The Court notes that Debtor filed his chapter 7 petition on September 28, 2000, and paid the required \$200.00 bankruptcy filing fee at that time. Only four months later, Debtor seeks to proceed *in forma pauperis* with this appeal. Debtor has not provided the Court with any information regarding any change of circumstances which would reflect his inability to pay the appeal filing fee.

IT IS HEREBY ORDERED that Debtor's Application to Proceed *In Forma Pauperis* is denied.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 18th day of April, 2001